

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 27 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                        |   |                            |
|------------------------|---|----------------------------|
| THE STATE OF ARIZONA,  | ) | 2 CA-CR 2011-0308-PR       |
|                        | ) | DEPARTMENT A               |
| Respondent,            | ) |                            |
|                        | ) | <u>MEMORANDUM DECISION</u> |
| v.                     | ) | Not for Publication        |
|                        | ) | Rule 111, Rules of         |
| ROBERT CARRASCO GAMEZ, | ) | the Supreme Court          |
|                        | ) |                            |
| Petitioner.            | ) |                            |
| _____                  | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020991

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Robert C. Gamez

Florence  
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Robert Gamez was convicted of two counts each of attempted first-degree murder, aggravated assault with a deadly weapon, and endangerment. The trial court sentenced him to aggravated, concurrent and

consecutive prison terms totaling forty-six years. We affirmed Gamez's convictions and sentences on appeal.<sup>1</sup> *State v. Gamez*, No. 2 CA-CR 2003-0201 (memorandum decision filed Feb. 28, 2006).

¶2 After Gamez's attorney filed a notice stating she could "find no issues for review" to raise in a petition for post-conviction relief, Gamez filed his first supplemental, pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court denied. Subsequently, after Gamez's new attorney filed a notice citing *Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995), and "tender[ed] a good faith belief that no good faith basis in fact and/or law for post-conviction relief exists on this record," Gamez filed another pro se Rule 32 petition, which the court also denied. Gamez now challenges the court's denial of that petition. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶3 On review, Gamez raises numerous claims, which we summarize as follows: (1) a change in Arizona law applies retroactively to his case; (2) trial, appellate, and Rule 32 counsel<sup>2</sup> were ineffective for multiple reasons; (3) the trial court erred for

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<sup>1</sup>We initially affirmed Gamez's convictions, but vacated his sentences and remanded for resentencing. *State v. Gamez*, No. 2 CA-CR 2003-0201 (memorandum decision filed April 28, 2005). However, after our supreme court granted the state's petition for review and remanded the case to us for reconsideration, *State v. Gamez*, No. CR-05-0204-PR (Ariz. Jan. 4, 2006), we vacated our prior decision and replaced it with a decision affirming Gamez's convictions and sentences. *State v. Gamez*, No. 2 CA-CR 2003-0201 (memorandum decision filed Feb. 28, 2006).

<sup>2</sup>We decline to address Gamez's claim that Rule 32 counsel was ineffective because it does not appear Gamez raised this claim in his petition below, *see* Ariz. R. Crim. P. 32.9(c)(1)(ii), and because, in any event, a non-pleading defendant has no

many reasons, summarized by the trial court in its ruling below; (4) the prosecutor mishandled and failed to properly disclose exculpatory evidence; and, (5) newly discovered material facts existed. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶4 Based on the record before us, we cannot say the trial court abused its discretion in denying Gamez's petition for post-conviction relief. The court did so in a detailed and thorough minute entry order that clearly identified Gamez's arguments and correctly ruled on them in a manner that will allow any future court to understand their resolution. With the following exception, we therefore approve and adopt the court's ruling and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 To the extent the trial court found Gamez was precluded from raising certain claims of ineffective assistance of counsel because the underlying claims were fully adjudicated on appeal, we note that a claim of ineffective assistance of counsel is independent from the claim upon which it is based. Claims of ineffective assistance of counsel, unlike the underlying claims, can be raised pursuant to Rule 32 only, not on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Consequently, the court erred when it found the claims of ineffective assistance of counsel based on claims raised on appeal precluded. Nevertheless, the court did not abuse its discretion in denying relief because, as we found on appeal, these issues were

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constitutional right to counsel or effective assistance in post-conviction proceedings. *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011).

without merit; therefore, the related claims of ineffective assistance of counsel necessarily fail. Moreover, as the court also found, the claims were precluded nonetheless because Gamez could have raised them in his first petition for post-conviction relief. *See Swoopes*, 216 Ariz. 390, ¶ 25, 166 P.3d at 953, *quoting Spreitz*, 201 Ariz. 1, ¶ 4, 39 P.3d at 526 (“[S]uccessive [ineffective assistance of counsel] claims ‘will be deemed waived and precluded’ not only when they previously were raised, but also when they ‘could have been raised’ in a prior Rule 32 proceeding.”).

¶6 Finally, to the extent Gamez challenges on review the trial court’s denial of his motion to submit additional exhibits supporting his Rule 32 petition and his motion to order a subpoena for discovery regarding alleged environmental issues at his elementary school, we decline to address that argument. The order Gamez appears to be challenging is not part of the court’s ruling on the petition for post-conviction relief, the only ruling before us on review. *See* Ariz. R. Crim. P. 32.9(c).

¶7 Because the trial court did not abuse its discretion by denying post-conviction relief, we grant the petition for review but deny relief.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge